

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia.

APRIL TERM, 1916.

No. 2926 **313**

EDWARD O. SCAGGS AND MARION E. SCAGGS,
APPELLANTS,

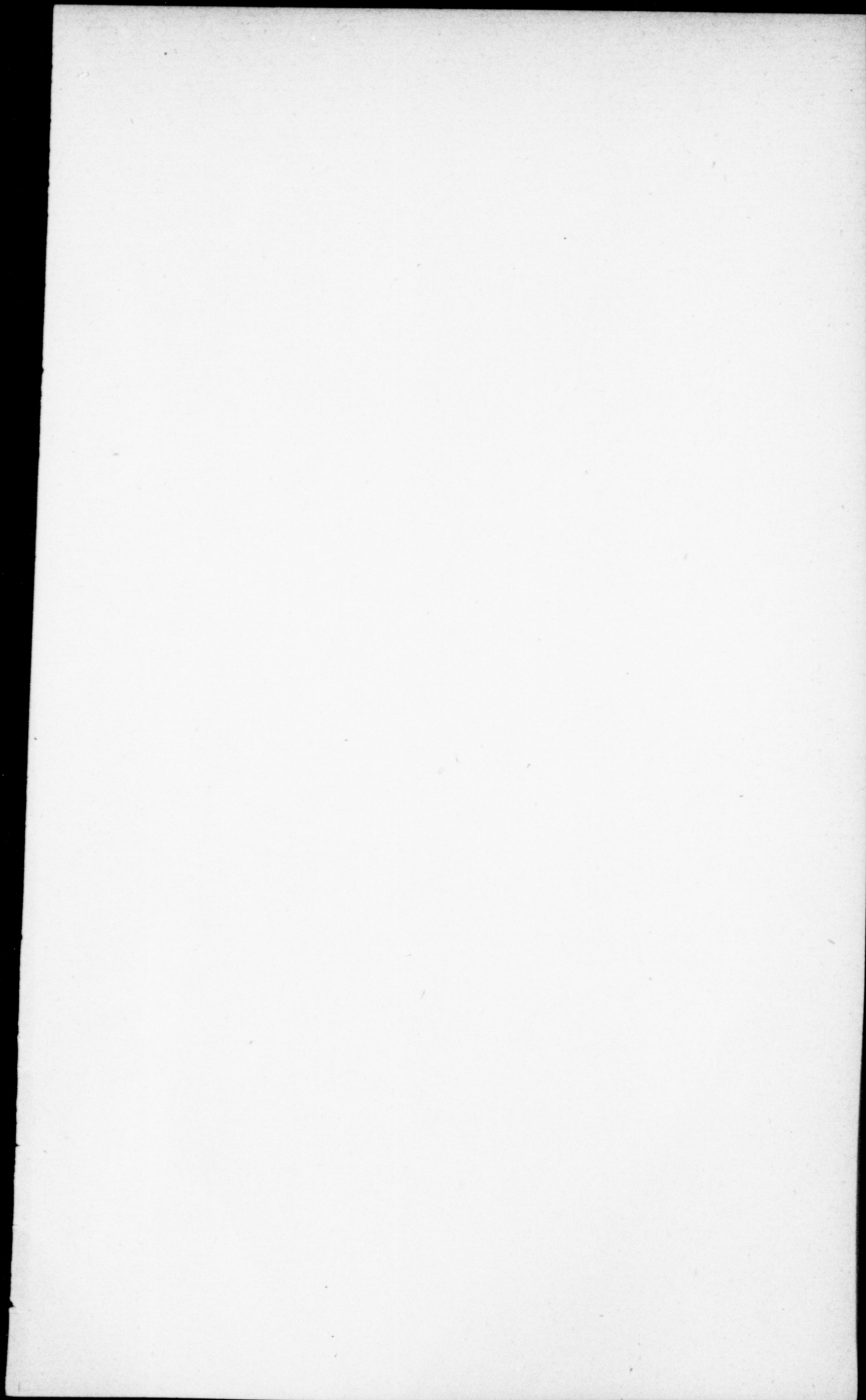
vs.

JAMES B. GALLAGHER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED FEBRUARY 8, 1916.

PRINTED APRIL 12, 1916.



Court of Appeals of the District of Columbia.

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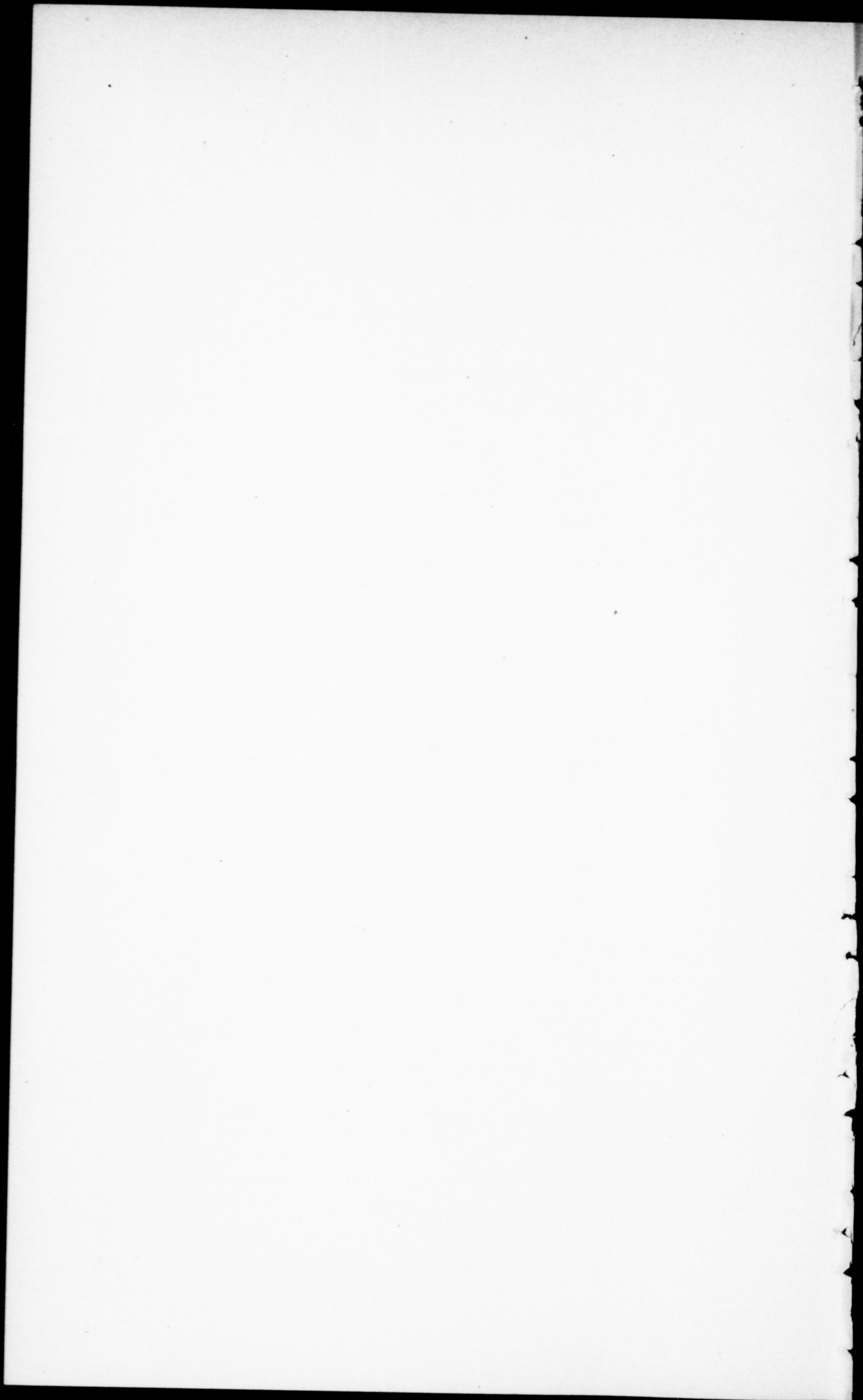
vs.

JAMES B. GALLAGHER, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

INDEX.

	Original.	Print
Caption	<i>a</i>	1
Bill	1	1
Answer of defendants.....	9	6
Decree	12	8
Appeal noted by defendants.....	13	8
Appeal bond	14	9
Memorandum: Order approving appeal bond and time to submit statement of evidence and file transcript of record extended..	15	10
Assignment of errors.....	15	10
Memoranda: Time to perfect statement of evidence and file transcript of record extended.....	15	10
Digest of testimony signed.....	15	10
Designation of record.....	16	10
Clerk's certificate	17	11
Digest of testimony.....	18	11
Deeds, &c.	18	11
Testimony of plaintiff	19	12
A. R. McChesney.....	22	14
Patrick Gleason	26	16
J. F. Anderson.....	26	16
Deeds offered in evidence.....	27	17
Return to writ of certiorari.....	30	18



Court of Appeals of the District of Columbia.

No. 2926.

EDWARD O. SCAGGS et al., Appellants,
vs.
JAMES B. GALLAGHER.

a Supreme Court of the District of Columbia.

In Equity. No. 33015.

JAMES B. GALLAGHER, Plaintiff,
vs.
EDWARD O. SCAGGS and MARION E. SCAGGS, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1

Bill.

Filed November 7, 1914.

In the Supreme Court of the District of Columbia.

In Equity. No. 33015.

JAMES B. GALLAGHER
v.
EDWARD O. SCAGGS and MARION E. SCAGGS.

The plaintiff states as follows:

1. That he is a citizen of the United States and a resident of the District of Columbia, and sues in his own right.

2. The defendants are husband and wife, are citizens of the United States and residents of the District of Columbia, and are sued in their own right.

3. Heretofore and prior to July 1st, 1883, the title to Block seven

(7) in Todd and Brown's subdivision of the tracts of land known as "Pleasant Plains" and "Mount Pleasant" in the County of Washington, District of Columbia, as per plat recorded in Liber Levy Court No. 2, folio 24, of the records of the office of the surveyor of the District of Columbia, was vested in Algeron R. McChesney and Henry Bakersmith as trustees for the Enterprise Building Company, an unincorporated association, with power in said trustees to sell and convey in their discretion. The said Block seven (7) fronted on Georgia avenue, then Seventh street road, extending Westerly to Sherman avenue, being bounded on its Southern boundary by Irving street, then Wallach street. A diagram showing the parcels into which lot one (1), Block seven (7), were divided and the alleyway as laid out for their accommodation is herewith filed and made part hereof as Plaintiff's Exhibit No. 1.

2 4. For the purpose of sale said Block seven (7) was divided into sundry parcels, and one of the lots in said Block, to wit: Lot one (1) was divided into three parcels, two of those parcels fronting on Georgia avenue, immediately at the rear of which two parcels an alleyway ten (10) feet wide and extending from the North line of Irving street Northerly fifty (50) feet to the North line of said lot one (1), was reserved for the benefit of the parcels into which said lot one (1) was subdivided. On the West side of said ten (10) foot alleyway was another part of lot one (1) fronting forty (40) feet on Irving street by a depth of fifty (50) feet; and said alleyway was well defined, so that the fact of its existence as an easement appurtenant to said parcels of lot one (1) was apparent to any person dealing with said portions of lot one (1).

5. By deed dated June 13, 1883, recorded in Liber 1048, folio 247, of the land records of the District of Columbia, said McChesney and Bakersmith, Trustees, conveyed to John W. Payne the following described portion of said lot one (1) in Block seven (7), together with the alley easement hereinbefore referred to:

All that part or parcel of land known and being in Block seven (7) and part of lot one (1) of Todd and Brown's subdivision of part of "Pleasant Plains" and "Mount Pleasant" as by recorded subdivision of said plat William Forsyth survey and subdivision April, 1868. Beginning for the part of the lot twenty (20) feet from the corner of Wallach street and Seventh street road, along Seventh street road, North, then one hundred (100) feet West to alley, then thirty (30) feet North, then one hundred (100) feet East, then thirty (30) feet South along Seventh street road to the place of beginning, containing 3,000 feet of ground, together with all the improvements, ways, easements, privileges, rights, appurtenances and hereditaments to the same belonging or in anywise appertaining.

3 6. By deed dated September 6, 1883, recorded in Liber 1053, folio 443, of said land records, said John W. Payne and wife, conveyed the last aforesaid part of lot one (1) in Block seven (7), and said alley easement, to the plaintiff James B. Gallagher, the description in said deed reading as follows:

Part of lot one (1) in Block seven (7), in Todd and Brown's re-

corded subdivision of "Pleasant Plains" and "Mount Pleasant," being the North thirty (30) feet of said lot one (1) by the depth of one hundred (100) feet. Beginning for the same twenty (20) feet North from the southeast corner of said lot and running thence North along the line of Seventh street road thirty (30) feet, thence West one hundred (100) feet to an alley, thence South along said alley thirty (30) feet, thence East one hundred (100) feet to the place of beginning.

7. Upon the acquisition of the title to said last mentioned part of lot one (1), Block seven (7), and said alley easement, said Gallagher built a dwelling house on the front part of said lot, and in the rear thereof erected a shed having a door or gate running out into said alleyway.

8. After the said dwelling house had been completed, and by deed dated November 4, 1886, recorded in Liber No. 1211, folio 340, of said land records, the defendant Edward O. Scaggs acquired by purchase that part of said lot one (1), Block seven (7), along the West of said alleyway, the description in said deed reading as follows:

4 Part of lot one (1), in Block seven (7), in Todd and Brown's subdivision of "Mount Pleasant" and "Pleasant Plains" and duly recorded in the land records for said District. Beginning for the same one hundred and ten (110) feet from the northwest corner of Seventh street Road and Wallach street, and running thence North fifty (50) feet, thence West forty one and 50/100 feet, thence South fifty (50) feet, thence East forty-one and 50/100 feet to the place of beginning.

9. After the conveyance aforesaid to said Scaggs he erected a dwelling upon said part of said lot so purchased by him and in so building upon said part of said lot availed himself of the said alleyway and adjusted his buildings and fences thereto.

From the date of his acquisition of said part of lot one (1), Block seven (7), said Scaggs, together with his said wife, occupied said part of lot one (1) Block seven (7), purchased by said Edward O. Scaggs, and continuously from the date of such acquisition to on or about August 19, 1914, used said alleyway as such and fully recognized its existence as the private alleyway set apart for the benefit of the three parts of said lot one, Block seven (7), into which it had been divided and sold, and neither said Scaggs nor his said wife ever claimed or asserted any right or interest in said strip ten (10) feet wide by fifty (50) feet deep other than as owners in common with the plaintiff and the other owner of the remaining part of said lot one (1), Block seven (7), of the alley easement hereinbefore described; and the plaintiff avers that from a time prior to the purchase by said Scaggs of said part of said lot one (1) the said Edward O. Scaggs and Marion E. Scaggs had actual notice and knowledge that the said strip ten (10) feet wide by fifty (50) feet deep had been so set apart for an alleyway and that the same was subject to an
5 easement for such alley use in favor of each of the three owners of the three parcels into which said lot one (1) had been subdivided.

10. On or about the 19th day of August, 1914, the said Edward

O. Scaggs and Marion E. Scaggs called on Algeron R. McChesney and requested him to convey said alley strip to them as joint tenants, stating their purpose in asking for such conveyance to be their desire to maintain the said strip as an alleyway and to prevent embarrassment by tax sales thereof.

The said McChesney having been much annoyed by tax notices concerning taxes upon said alley strip which had remained assessed on the tax records of the District of Columbia to said McChesney and Bakersmith, trustees, and without any consideration being paid him by said Scaggs and wife, and solely for the purpose of perpetuating said strip for an alleyway for the benefit of said three parts of said lot one (1), Block seven (7), said McChesney, describing himself as surviving trustee of the Enterprise Building Company, conveyed to said Edward O. Scaggs and Marion E. Scaggs, his wife, by deed dated August 19, 1914, recorded in Liber 3727, folio 255, of said land records, the said alley strip by the following description:

Part of Lot one (1), in Block seven (7), in Todd and Brown's subdivision of part of "Pleasant Plains" and "Mount Pleasant," as per plat recorded in Liber Levy Court No. 2, folio 24, of the records of the office of the surveyor of the District of Columbia, described as follows: Beginning for the same on the North line of Irving street at a point distant forty-one and five-tenths (41.5) feet East of the southwest corner of said lot, running thence East ten (10) feet; thence North fifty (50) feet to the North line of said lot; 6 thence West on said North line of said lot ten (10) feet; thence South fifty (50) feet to the point of beginning; being designated for taxation purposes on the books of the Assessor of the District of Columbia as lot 802 in Square 2891.

So far as plaintiff knows the said Bakersmith is still living and the said McChesney was without any title or authority or right to describe himself as surviving trustee and to make said deed to said Scaggs and wife, nor were the trusts under which said Block seven (7) was held by said McChesney and Bakersmith such as to authorize them or either of them to execute a voluntary conveyance of any part of said Block seven (7).

11. After obtaining said deed the said Scaggs and wife commenced the erection of certain structures in said alleyway, whereupon plaintiff notified them that the said strip, as they well knew, was an alleyway and that they were without any title or authority in anywise to obstruct it, yet the said defendants, although they well knew that the statement of plaintiff was well founded, proceeded to erect certain structures of inconsiderable value and which were so erected as to obstruct the said alleyway and prevent plaintiff from utilizing it for the purpose for which it was set apart, so that he is by the erection of said structures cut off and prevented from having access to Irving street as was contemplated by the setting apart of the said ten (10) foot strip as an alleyway.

12. The maintenance, unobstructed, of the said alleyway is essential to the advantageous use of plaintiff's part of said lot one (1), Block seven (7), and if he be deprived of that use the value of his

7 said property will be greatly diminished, the price thereof depreciated and the opportunity to sell the same at an advantageous price destroyed. The use of his said premises will also be rendered extremely inconvenient, because of the necessity which the obstruction of said alleyway will impose upon the plaintiff of carrying out all garbage and other refuse through the front of his lot and of bringing in coal and wood through the front thereof.

13. The structures erected by the defendants are of such a character that they can be removed with very trifling expense and their removal will leave the defendants in the enjoyment of exactly the same property which they purchased, with the same easement which they then acquired, and subject only to the easement in favor of other owners in the same lot and Block, of which they had full notice and knowledge, both actual and constructive before they purchased.

14. Plaintiff avers that an action for damages for the obstruction of said alleyway would afford no adequate relief, and the manifestation and vindication of his rights at law would require constantly recurring suits, whereas the remedy in equity by mandatory injunction to compel the removal of said unauthorized obstructions of said alleyway would afford complete relief in the premises.

Plaintiff therefore prays:

1. That the said strip of land ten (10) feet wide by fifty (50) feet deep, set apart and designated as an alleyway as aforesaid, may be decreed to be a private alley, laid out and established for the common benefit of the plaintiff and the said two other owners of the remainder of said lot one (1).

2. That the said deed from said McChesney, as surviving trustee, to said Scaggs and wife be decreed to be null and void and be set aside.

8 3. That by the mandatory injunction of this court the defendants may be required to remove the said obstructions placed by them in said alleyway and to restore the same to the condition in which it was at the time when said obstructions were placed by the defendants in said alleyway.

4. That the defendants may be perpetually enjoined from hereafter erecting any other obstructions or structures in said alleyway.

5. That plaintiff may have such other and further relief as the nature of his case may require.

To which end plaintiff prays for process of subpoena against the defendants Edward O. Scaggs and Marion E. Scaggs, his wife, requiring them to appear and answer the exigency of this Bill, answer under oath being expressly waived.

JAMES B. GALLAGHER.

OSCAR NAUCK,
JNO. RIDOUT,
Att'ys for Plaintiff.

DISTRICT OF COLUMBIA, ss:

I, James B. Gallagher, do swear that I have read the foregoing Bill of Complaint by me subscribed and know the contents thereof; that the facts therein stated upon my personal knowledge are true, and

that those therein stated upon information and belief I believe to be true.

JAMES B. GALLAGHER.

Subscribed and sworn to before me this sixth day of November, 1914.

[SEAL.]

VICTOR H. SEHORN,
Notary Public, D. C.

My Commission expires October 18, 1916.

9

Answer of Defendants.

Filed December 2, 1914.

* * * * *

1. It is admitted that the complainant is a citizen of the United States and a resident of the District of Columbia.

2. The allegations of paragraph two of the bill are admitted.

3. In answer to paragraph three of the bill, it is admitted that title to Block 7 in Todd & Brown's Sub. was vested in Algernon R. McChesney and Henry Bakersmith as trustees, as therein described, but it is denied that Lot 1 of Block 7 was ever subdivided and recorded as such. It is true that three portions of said Lot 1 have been sold by the owners of said Lot 1, but in said deeds no privilege or use of an alley was conveyed in said deeds.

4. In answer to paragraph four of said bill your defendants answer and say it is true Block 7 was divided into sundry parcels and one of the lots in said block, to wit, Lot 1, was deeded by said owners in three different portions to three different persons, but in said deeds no easement or privilege of an alley was conveyed, as alleged in said bill of complaint.

5. In answer to paragraph five of said bill your defendants answer and say it is admitted that a portion of Lot 1 of Block 7 was deeded to John W. Payne, recorded in Liber 1048, but it is denied that said deed conveyed any privilege or easement or use of an alley.

6. In answer to paragraph six of the bill your defendants say it is admitted part of Lot 1 was deeded to the said plaintiff herein, James G. Gallagher, but it is denied that any right or privilege or easement to an alley was conveyed in said deed.

7. In answer to paragraph seven of said bill your defendants say that they deny that said plaintiff ever was deeded the right or privilege or easement of an alley as alleged.

8. In answer to paragraph eight of the bill your defendants say it is true they purchased and own a portion of Lot 1 of Block 7 as described in Liber 1211, folio 340, of the land records of the District of Columbia, but that said lot adjoins a lot that was owned and assessed in the name of the trustees from whom they purchased and said lot remained in the name of said trustees and assessed in the tax records of the District of Columbia up to the conveyance of said lot by said trustees to your defendants jointly, and was duly recorded on August 21, 1914, in the land records of the District of Columbia,

and said lot is not, nor never was, an easement to the lot of said plaintiff.

9. In answer to paragraph nine of the bill your defendants say it is not true that they ever recognized the lot adjoining the lot of said Edward O. Scaggs as an alley, but only as a lot that remained of record in the name of the trustees, being a lot 10 feet wide by 50 feet deep.

10. Your defendants, in answer to paragraph ten of the bill, say that on the 19th day of August, 1914, the said Algernon R. McChesney, as surviving trustee, did convey to the aforesaid defendants as joint tenants a lot 10 feet by 50 feet adjoining the said lot of Edward O. Scaggs, and the said strip of land as described as 10 feet wide by 50 feet deep was not an alley and never was an alley, but was

a part of Lot 1 of Block 7 that remained in the name of, and
11 was assessed in the name of, said trustees and was never recorded in any record of the District of Columbia as an alley. The legal title of said strip of land 50 feet by 10 feet conveyed by said surviving trustee to the said defendants is recorded in Liber 3127, folio 255, and the said plaintiff is without any easement over said strip of land, and said surviving trustee had a legal right to convey said land, and the said trustee is the surviving trustee.

11. In answer to paragraph eleven your defendants say that they deny that said strip of land is an alley, but said strip of land 10 feet by 50 feet of Lot 1, Block 7, was the remaining lot in Lot 1, Block 7, vested in said trustees, and said surviving trustee had a legal right to do so, and did as aforesaid convey the legal title to said lot to the defendants herein, and they, the said defendants, had a legal right to build upon said lot, and said defendants were in nowise under any legal obligations to said plaintiff as alleged.

12. In answer to paragraph twelve of the bill your defendants say that they had as aforesaid a right to build on the said strip of land, as the said lot was as aforesaid conveyed to them and they own the legal title to the same of record; and, further, it is denied that said lot is an easement of the lot owned by the plaintiff; and, further, the said plaintiff has a side alley or entrance to his land that opens on Georgia Avenue, N. W., which he uses and always has used.

13. In answer to paragraph thirteen of the said bill your defendants say that as aforesaid they deny that said strip of land is an alley, and as aforesaid they own the legal title to said strip of land and had a legal right to build upon it.

14. In answer to paragraph fourteen of the bill of complaint
12 the defendants say that the complainant neither had nor has any legal or equitable right to file the above bill, and your defendants, having answered the bill of complaint fully and having herein shown that the record legal title to said strip of land was in the said surviving trustee and by him conveyed to said defendants herein long prior to the filing of this cause, pray that the bill be dismissed with costs against the plaintiff.

EDWARD O. SCAGGS.
MARION E. SCAGGS.

DISTRICT OF COLUMBIA, ss:

We do solemnly swear that we have read the foregoing bill by us subscribed, and that the facts stated therein are true and those stated upon information and belief we believe to be true.

EDWARD O. SCAGGS.
MARION E. SCAGGS.

Subscribed and sworn to before me, this 2d day of December,
A. D. 1914.

[SEAL.]

JOS. H. BLACKWOOD,
Notary Public, D. C.

G. W. DREW,
Att'y for Defendants.

Decree.

Filed October 11, 1915.

* * * * *

This cause standing ready for hearing and having been heard and duly considered, it is this 11 day of October, 1915, ordered, adjudged and decreed that the title to the strip of land described in the Bill, as follows:

13 Part of lot one (1), in Block seven (7), in Todd and Brown's subdivision of part of "Pleasant Plains" and "Mount Pleasant," as per plat recorded in Liber Levy Court No. 2, folio 24, of the records of the office of the surveyor of the District of Columbia, described as follows: Beginning for the same on the North line of Irving street at a point distant One hundred (100) feet West of the Southeast corner of said lot one (1), running thence West Ten (10) feet, thence North Fifty (50) feet to the North line of said lot, thence East Ten (10) feet and thence South Fifty (50) feet to the point of beginning; being designated for taxation purposes on the books of the Assessor of the District of Columbia as lot 802 in Square 2891—

is vested in the defendants subject to a perpetual easement for alley purposes in the plaintiff in fee simple.

That the structures described in the Bill, erected by the defendants, shall be removed by them at their cost and expense on or before the 15th day of October, 1915.

That the said defendants and all persons claiming under them be, and they are hereby, perpetually enjoined from in anywise obstructing the use of said easement of alley way over said Ten (10) foot strip.

That the plaintiff recover against the defendants the costs in this cause to be taxed by the clerk and have execution thereof as at law.

By the Court.

WALTER I. McCOY, *Justice.*

From this decree the defendants in open court pray an appeal to the Court of Appeals, and on their motion the penalty of the bond

on such appeal, if for costs is fixed at One hundred (\$100.00) Dollars, and if to operate as a supersedeas at Two Hundred Dollars.

WALTER I. McCOY, *Justice*.

G. W. D.

14 In the Supreme Court of the District of Columbia.

Filed Oct. 27, 1915. J. R. Young, Clerk.

At Law. No. 33015. In Equity.

JAMES R. GALLAGHER, Plaintiff,

vs.

EDWARD O. SCAGGS and MARION E. SCAGGS.

Know all Men by these Presents, That we, Edward O. Scaggs and Marion E. Scaggs, as principals, and Robert Lee Scaggs, as surety, are held and firmly bound unto the above-named John R. Gallagher in the full sum of Two Hundred (\$200.00) dollars to be paid to the said executors, administrators, successors, or assigns. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors, and assigns firmly by these presents. Sealed with our seals and dated this — day of October, in the year of our Lord one thousand nine hundred and —.

Whereas the above-named Edward O. Scaggs and Marion E. Scaggs have prosecuted an appeal to the Court of Appeals of the District of Columbia, to reverse the Judgment—Decree—rendered in the above suit by the said Supreme Court of the District of Columbia:

Now, therefore, the condition of this Obligation is such, That if the above-named Edward O. Scaggs and Marion E. Scaggs shall prosecute — said appeal to effect, and answer all damages and costs if — shall fail to make good — plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

Sealed and delivered in the presence of—

EDWARD O. SCAGGS.	[SEAL.]
MARION E. SCAGGS.	[SEAL.]
ROBERT LEE SCAGGS.	[SEAL.]
— — —.	[SEAL.]

Approved December 1st, 1915.

See order of that date.

WALTER I. McCOY, *Justice*.

Approved the 26th day of October, 1915.

WALTER I. McCOY,
Justice, S. C. D. C.

O. K.

J. R. YOUNG, *Clk.*

2—2926a

[Endorsed:] Supreme Court, District of Columbia. No. —. *Law. Equity.* — vs. —. Supersedeas Bond for Appeal to Court of Appeals.

15

Memorandum.

December 1, 1915.—Order approving appeal bond, and time to submit statement of evidence and file transcript of record extended 30 days from date.

Assignment of Errors.

Filed December 17, 1915.

* * * * *

1. The Court below, erred in sustaining the prayers of the Bill, and granting the relief therein prayed for.

2. The Court erred in holding that the lot in question was an alley, with right of use, in the plaintiff.

3. The Court erred, in holding that the deed to the defendants, vested in the defendants, the fee-simple title to said lot, subjected to easement in the plaintiff.

G. W. DREW.

Service of Copy ackl. this 17th day Dec., 1915.
JNO. RIDOUT.

Memoranda.

December 29, 1915.—Time to perfect statement of evidence and file transcript of record extended to February 10, 1916.

January 13, 1916.—Digest of testimony signed by McCoy, Justice.

16

Designation of Record.

Filed January 13, 1916.

* * * * *

The Clerk will please make up the record for the Appeal of the Defendants in the above entitled cause, and include therein the following, viz:

1. The Bill of Complaint, filed Nov. 7, 1914.
2. The Defendants' answer thereto, filed Dec. 2, 1914.
3. Final Decree and Appeal by Defendants.
4. Statement of Evidence filed (mem.).
5. Assignment of Errors.
6. Designation.

G. W. DREW,
Att'y for Defendants.

17 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing-pages numbered from 1 to 16, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 33015, in Equity, wherein James B. Gallagher is Plaintiff and Edward O. Scaggs and Marion E. Scaggs are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 26th day of January, 1916.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

18 In the Supreme Court of the District of Columbia.

No. 33015. Equity.

JAMES B. GALLAGHER

v.

EDWARD O. SCAGGS and MARION E. SCAGGS.

Digest of Testimony.

Be it remembered that at the trial of this cause before Mr. Justice McCoy on the 7th day of October, A. D. 1915, the plaintiff, in support of his cause of action, gave in evidence substantially as follows:

The plaintiff offered in evidence the Deed from A. R. McChesney and Henry Bakersmith, Trustees, to John W. Payne, dated the 13th day of June, 1883, whereby the grantors, describing themselves as trustees of the Enterprise Building Company of the District of Columbia, conveyed to said Payne, in fee simple, certain real estate in the County of Washington, District of Columbia, described as follows:

All that part or parcel of land known and being in Block seven (7) and part of lot one (1) Todd and Brown's subdivision of part of "Pleasant Plains" as by recorded subdivision of said plat William Forsyth survey and subdivision April, 1868. Beginning for the part of the lot twenty (20) feet from the corner of Wallach street and Seventh street road, along Seventh street road, North, then one hundred (100) feet West to alley, then thirty (30) feet North, then one hundred (100) feet East, then thirty (30) feet South along Seventh street road to the place of beginning, containing 3,000 feet of ground, together with all the improvements, ways, easements,

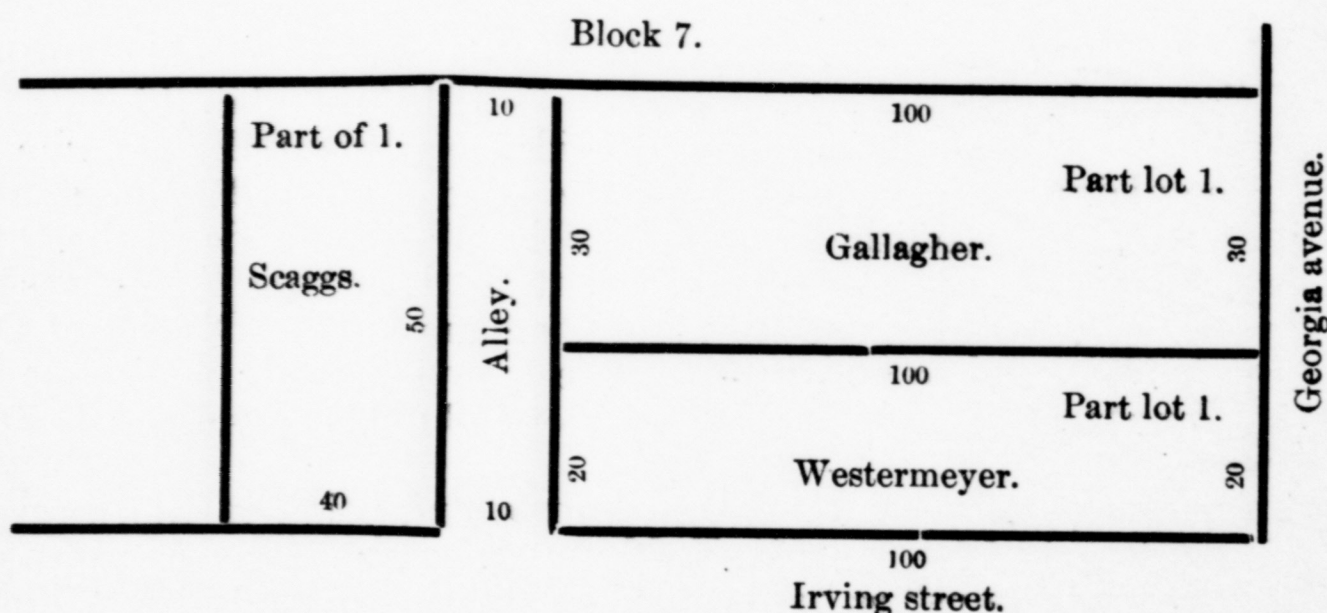
privileges, rights, appurtenances, and hereditaments, to the same belonging, or in anywise appertaining.

Deed from John W. Payne and wife to James Bernard Gallagher, the plaintiff, dated September 6, 1883, whereby the following described parcel of land was conveyed in fee simple to said
19 Gallagher:

Part of lot one (1) in Block seven (7), in Todd and Brown's recorded subdivision of "Pleasant Plains" and "Mount Pleasant," being the North thirty (30) feet of said lot one (1) by the depth of one hundred (100) feet, Beginning for the same twenty (20) feet North from the southeast corner of said lot and running thence North along the line of Seventh street road thirty (30) feet, thence West one hundred (100) feet to an alley, thence South along said alley thirty (30) feet, thence East one hundred (100) feet to the place of beginning, together with all the improvements, ways, easements, rights, privileges, appurtenances, and hereditaments, to the same belonging, or in anywise appertaining.

Whereupon the plaintiff testified, in substance, that Block seven (7) in Todd and Brown's subdivision of tracts of land known as "Pleasant Plains" and "Mount Pleasant" fronted on Georgia avenue, originally known as Seventh street road, extending Westerly to Sherman avenue, being bounded on its Southern boundary by Irving street, formerly Wallach street; and that the diagram marked "Plaintiff's Exhibit No. 1" to the Bill correctly exhibited the parcels into which lot one (1), Block seven (7), were divided and the alleyway as laid out for their accommodation. The diagram referred to by the witness is here inserted:

"PLAINTIFF'S EXHIBIT NO. 1."



20 That witness had known the property since June, 1883, and that shortly after the conveyance from Payne and wife to him the witness built a dwelling house on the front part of said lot and in the rear thereof erected a shed having a door or gate opening out into said alleyway; that at the time when said house was so erected the said alleyway was in visible use and occupation and the houses

built upon adjoining portions of said lot one (1) were so built, and the sheds connected therewith so located, as to indicate the existence and use of said alleyway as located on "Plaintiff's Exhibit No. 1"; that after the defendant Edward O. Scaggs acquired title to part of said lot one (1), in Block seven (7), which adjoins said alleyway on the West, being the part marked "Scaggs" on said diagram, he erected a dwelling house upon the part of said lot purchased by him, and in so building availed himself of the said alleyway and adjusted his buildings and fences and stable thereto; that this condition of affairs continued without interruption, the said alleyway being used by the three persons whose property abutted thereon; that the said Scaggs conducted a wood and coal business on property lying North of the North line of said alleyway and used the same for the purpose of ingress and egress to and from his said wood and coal yard out to Irving street, formerly known as Wallach street; that said Scaggs and his wife always fully recognized the existence of said strip of land as a private alleyway, set apart for the benefit of the three parts of said lot one (1) into which it had been divided and sold, and

21 that neither said Scaggs nor his wife ever claimed or asserted any right or interest in said strip other than as owners in

common with the plaintiff and the owner of the remaining part of said lot one from the time when said Scaggs purchased in November, 1886, down to the month of August, 1914; that in said month the said defendants obtained from A. R. McChesney, surviving trustee, without paying any consideration therefor, a conveyance purporting to convey said strip of land to said defendants. For the first time the said defendants, after obtaining said last mentioned Deed, made claim to ownership of said strip and commenced to erect thereon certain cheap structures, which were so located as to obstruct said alleyway and prevent the witness from utilizing it for the purposes of an alley. Plaintiff further testified that as soon as he observed the commencement of the erection of said structures he personally notified the defendants that they had no right to erect them, but defendants paid no attention to his warning, and therefore he was compelled to bring suit to procure the removal of the obstructions. That the said alleyway is essential to the advantageous use of plaintiff's property and that if he be deprived of the use of said alleyway the value of his property will be diminished, the price depreciated and the opportunity to sell the same, at an advantageous price, destroyed, the obstruction of said alleyway subjecting the plaintiff to great inconvenience, because, without said alleyway, plaintiff would be compelled to carry out all garbage and other refuse through the front of his lot and would have to bring in coal and wood through

22 the front part thereof; that if the said structures are removed the defendants will be subjected to very trifling expense and their removal will leave the defendants in the enjoyment of the same property which they purchased and with the same easement which they then acquired, subject only to the easement in favor of other owners, of which they had full notice and knowledge when they purchased.

Witness never purchased the property at tax sale.

ALGERNON R. McCHESNEY testified, in substance, that he was a member of The Enterprise Building Company which conducted business in the District of Columbia until sometime in the year 1883, and was also one of its trustees. The company owned all of Block seven (7) in Todd and Brown's subdivision of "Pleasant Plains" and "Mount Pleasant." The title to the whole of the Block was vested in the witness and Henry Bakersmith as trustees for said company, and more than thirty years ago the Enterprise Building Company sold, and by its trustees conveyed, to various purchasers all the lots in said Block; that is to say, the North thirty feet by one hundred feet was conveyed to John W. Payne by Deed dated June 13, 1883, and that Payne conveyed to James B. Gallagher by Deed dated September 6, 1883; that the South twenty feet by the depth of one hundred feet passed to the ownership of Frederick Westermeyer; that there was reserved and dedicated by the said Enterprise Building Company an easement or right of way of an alleyway ten (10) feet wide running from Irving street North to the North line of said lot one (1); that said alleyway was laid out, reserved, dedicated and used as such before the year 1883. After the sale to Payne and by him to Gallagher, and after the conveyance to Westmeyer, the said alleyway was continuously used as an alley by the adjoining property owners; that about the year 1886, defendant Edward O.

23 Scaggs acquired title to the West forty (40) feet on the North side of Irving street, by a depth of fifty (50) feet, running along the Western line of said alley. At the time when Scaggs purchased, the alleyway was in visible use and indicated by the location of the adjoining buildings. The said strip was carried continuously on the tax books of the Assessor of the District of Columbia from 1883. in the names of witness and Henry Bakersmith, as trustees for said Enterprise Building Company; that taxes accrued thereon, and witness being greatly annoyed by the insertion of his name as one of the trustees for said land in the tax sale advertisements, on divers occasions applied to the District authorities, calling their attention to the fact that the said strip was an alley and had been reserved as such for many years and asking permission to formally dedicate the same. Witness produced the following communications referred to by him:

McC., J. B.

"EXHIBIT McCHESNEY No. 1."

May 20, 1910.

Collector of Taxes, Washington, D. C.

DEAR SIR: Referring to the enclosed Tax Bills which you have against the property named therein, I understand this property has been sold for taxes, and you may send these bills to the buyer of this property.

These trustees offer to donate this property to the D. C. for an alley, for which purpose it was originally left years ago. But it appears they would never accept it. As far as I am concerned, I have nothing whatever to do with it.

Yours Truly,

A. R. McCHESNEY.

"EXHIBIT McCHESNEY No. 2."

Dec. 4, 1909.

Mr. William P. Richards, Assessor, District of Columbia, Washington, D. C.

DEAR SIR: In reference to the enclosed assessment, I beg to say I have written the Commissioners a number of times in reference to this, and it may not be useless to write them through you just
24 once more.

This 10 ft. on Irving street was left many years ago before subdivisions were recorded in the County, for the purpose of an alley. Mr. William T. Walthan, the other trustee, and myself have proposed a number of times to Deed this to the District, provided all the expenses attached thereto would be assumed by the District. We are willing to do so now, and I trust that you will either have this Deeded to the District or dispose of it in any way you think best; certainly I do not care to spend any more time in the matter than I have.

Yours Very Truly,

A. R. McCHESNEY.

McC.—J. B.

"EXHIBIT McCHESNEY No. 3."

Commissioners of the District of Columbia.

Office of the Assessor.

WASHINGTON, December 6, 1909.

Mr. A. R. McChesney, 429 K Street N. W.

DEAR SIR: In reply to your letter of December 4, regarding a special assessment, I will state that upon looking up the lot mentioned by you I find the property so much involved that it is difficult to see how the District can straighten the matter out. It has been sold for taxes on two or three occasions and I would advise you, if you care to have no further interest in the property, to simply let it pass to the ownership of those who buy it for taxes as I can see no way of preventing these notices being sent to you as long as this property is in your name.

I enclose memorandum made by the clerk to the water main tax which states the case very clearly.

Respectfully,

WM. P. RICHARDS,
Assessor, D. C.

W. P. R./J.

25 In the month of August, 1914, the defendant Marion E. Scaggs and her husband, who had frequently previously called upon witness and endeavored to purchase the alleyway, again called and stated that a Mr. Gallagher had bought the alley for taxes and in-

tended to close it and that to prevent such closing of the alley they requested the witness to give them a deed therefor. Scaggs and his wife brought witness a Deed which he was unwilling to sign. Whereupon he suggested that they procure a Deed to be prepared by the Columbia Title Insurance Company. In referring to the strip they spoke of it as an alley. Witness told them it was meant to be used and conveyed for no other purpose than that of an alleyway and that he had written to the Commissioners tendering this property for that purpose and that they would only be getting a law suit, but they said they were willing to take the chances. Thereupon, believing their purpose to be to preserve the alleyway, witness executed a conveyance to Edward O. Scaggs and Marion E. Scaggs, as joint tenants in fee. No consideration was offered by them or received by the witness and the said strip of land was given and not sold to them.

The said Enterprise Building Company has had no existence since the latter part of the year 1883.

Henry Bakersmith, co-trustee with witness, left Washington a number of years ago and went to St. Louis, Missouri, but the witness does not know his present address or whether he is living or dead.

PATRICK GLEASON testified in substance that he has resided in the neighborhood of Georgia avenue and Irving street for fourteen years; that he is a blacksmith by trade and that the defendant Edward O. Scaggs was one of his customers. Witness knows the piece of ground ten feet wide running along the East line of Mr. Scaggs' lot and in rear of the lots of Mr. Gallagher and Mr. Westmeyer and running into Irving street. This strip of ground has been used as an alleyway by the adjoining property owners during these fourteen years. Mr. Edward O. Scaggs used it as such and his teams were driven in and out of the same to and from his coal and wood yard which he conducted on the lot adjoining Mr. Gallagher's lot on the North. Witness used this alleyway in going to and from the blacksmith shop of Mr. Scaggs in Mr. Scaggs' coal yard to shoe his horses. The lines of the alleyway were well defined by Gallagher's shed or stable and Westermeyer's stable on the East line and Scaggs' carriage house on the West line and his stable with gates or doors opening into the alleyway, and it was through this alleyway that these stables and carriage house were reached. Any one could see it was an alley.

27 JAMES F. ANDERSON testified in substance that he has lived continuously in the neighborhood of Georgia avenue and Irving street for twenty eight years and that he knows the alleyway in rear of James B. Gallagher's lot; that this ten feet has been during all these twenty eight years used as an alleyway by Mr. Gallagher and the adjoining property owners, and that witness himself has used it as such; that he is a blacksmith by trade and Mr. Gallagher was at one time one of his customers. For about twenty years Mr. Gallagher kept a horse and stabled his horse and kept his carriage in the stable on the rear of his lot and fronting on this alley with a double gate opening into the alleyway. Mr. Gallagher used this alley

continuously during that time to take his horse and carriage in and out to and from Irving street, and witness has many times shod Gallagher's horse in the alley. Since Mr. Gallagher sold his horse and carriage he and his family have continued to use this strip of land as an alley.

Thereupon the plaintiff rested.

Thereupon the defendants moved the court to dismiss the Bill on the ground that the evidence adduced by the plaintiff was not sufficient to entitle him to recover, which motion was overruled and the defendants excepted.

Thereupon the defendants offered in evidence the Deed from Mary Riordan to Edward O. Scaggs, dated November 4, 1886, Recorded November 17, 1886, in Liber 1211, folio 340, of the land records of the District of Columbia, conveying—

Part of lot one (1), in Block seven (7), in Todd and Brown's subdivision of "Mount Pleasant" and "Pleasant Plains," and duly recorded in the land records of said District; beginning for the same one hundred and ten feet (110') from the North-West corner of Seventh street road and Wallach street, and running thence North fifty (50) feet, thence West forty-one and 50/100 feet, thence
28 South fifty (50) feet, thence East forty-one and 50/100 feet to the place of beginning.

Also the Deed from Algernon R. McChesney, surviving trustee, to Edward O. Scaggs and Marion E. Scaggs, dated August 19, 1914, recorded August 21, 1914, in Liber 3727, folio 255, of the land records of the District of Columbia, conveying the following described land:

Part of lot one (1), in Block seven (7), in Todd and Brown's subdivision of part of "Pleasant Plains" and "Mount Pleasant," as per plat recorded in Liber Levy Court No. 2, folio 24, of the records of the surveyor of the District of Columbia, described as follows: Beginning for the same on the North line of Irving street at a point distant forty-one and five tenths (41.5) feet East of the southwest corner of said lot, running thence East ten (10) feet; thence North fifty (50) feet to the North line of said lot; thence West on said North line of said lot ten (10) feet; thence South fifty (50) feet to the point of beginning; being designated for taxation purposes on the books of the Assessor of the District of Columbia as lot 802 in Square 2891.

Whereupon counsel for defendants rested and repeated his motion to dismiss the Bill on the ground that the plaintiff's testimony was not sufficient to entitle him to recover, which motion was overruled, to which the defendants by their counsel excepted.

I certify that the foregoing is a correct digest of all the testimony in the above entitled cause.

Witness my hand this 13th day of January, 1916.

WALTER I. McCOY, *Justice*.

Settled by agreement.

G. W. DREW,

Att'y for Dfs.

JNO. RIDOUT,

For Pl'ff.

29 [Endorsed:] District of Columbia Supreme Court. No. 2926. Edward O. Scaggs et al., appellants, vs. James B. Gallagher. Court of Appeals, District of Columbia. Filed Feb. 8, 1916. Henry W. Hodges, clerk.

30 *Return to Writ of Certiorari.*

Court of Appeals, District of Columbia, — Term, 1916.

No. 2926.

EDWARD O. SCAGGS and MARION E. SCAGGS, Appellants,

vs.

JAMES B. GALLAGHER.

Filed March 1, 1916.

31 THE UNITED STATES OF AMERICA, ss:

[Seal Court of Appeals, District of Columbia.]

The President of the United States of America to the Honorable the Justices of the Supreme Court of the District of Columbia, Greeting:

Whereas in a certain suit in said Supreme Court between — Equity No. 33015. James B. Gallagher, Plaintiff, and Edward O. Scaggs and Marion E. Scaggs, defendants, which suit was removed to the Court of Appeals of the District of Columbia by virtue of an appeal, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

1. Motion to vacate the approval on the 26th day of October, 1915, of Appellant's Appeal bond filed on November, 1915.

2. The order of Court passed Dec. 1, 1915, vacating said approval.

32 You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Court of Appeals, so that you have the same, together with this writ, before the said Court of Appeals forthwith.

Witness the Honorable Seth Shepard, Chief Justice of the said Court of Appeals, the 24th day of February, in the year of our Lord one thousand nine hundred and sixteen.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,

Clerk of the Court of Appeals of the District of Columbia.

[Endorsed:] Court of Appeals of the District of Columbia. No. 2926. January Term, 1916. Edward O. Scaggs and Marion E. Scaggs, Appellants, vs. James B. Gallagher. Writ of Certiorari.

33 *Motion to Vacate Approval of Appeal Bond.*

Filed November 3, 1915.

In the Supreme Court of the District of Columbia.

In Equity. No. 33015.

GALLAGHER

VS.

SCAGGS.

Now comes the Plaintiff by his Attorneys and moves the Court to vacate the approval of the defendants' Bond on Appeal herein because the same was improvidently made without the notice to Plaintiff's Attorney required by the Rules of this Court.

OSCAR NAUCK,
JOHN RIDOUT,
'Att'ys for Plaintiff.

Mr. George W. Drew, Att'y for Defendant:

Take notice that the above motion will be for hearing on Friday Nov. 5th, 1915.

OSCAR NAUCK,
JNO. RIDOUT,
Attorneys for Plaintiff.

34 *Order Vacating Approval of Appeal Bond.*

Filed December 1, 1915.

In the Supreme Court of the District of Columbia, Holding in Equity Court.

Equity. No. 33015.

JAMES R. GALLAGHER, Plaintiff,

VS.

EDWARD O. SCAGGS & MARION E. SCAGGS, Defendants.

Upon consideration of a motion made by the plaintiff in the above cause, on November 3, 1915, and continued, to vacate the approval of the defendants' "Bond on Appeal," because said Bond was approved, without notice to the plaintiff's attorney, It is this 1st day of Dec., 1915, ordered by the Court, that approval be, and hereby is vacated.

However, notice having been since given plaintiff's attorney, and the defendants' appeal bond being sufficient it is this 1st day of December, 1915, ordered, plaintiff's counsel objecting, that said appeal bond be and hereby is approved, and the time to submit the statement of evidence, and prepare the transcript of record be and hereby is extended thirty (30) days from date.

WALTER I. McCOY, *Justice.*

35

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, do hereby certify in obedience to the Writ of Certiorari hereto attached and returned herewith, that the foregoing are true and correct copies of the

"Motion to vacate the approval on the 26th day of October, 1915, of Appellants' Appeal Bond filed on November —, 1915," and

"The order of Court passed Dec. 1, 1915, vacating said approval"

containing the words omitted from the record heretofore transmitted to the Court of Appeals of the District of Columbia, in cause entitled James B. Gallagher, Plaintiff, vs. Edward O. Scaggs and Marion E. Scaggs, Equity No. 33015.

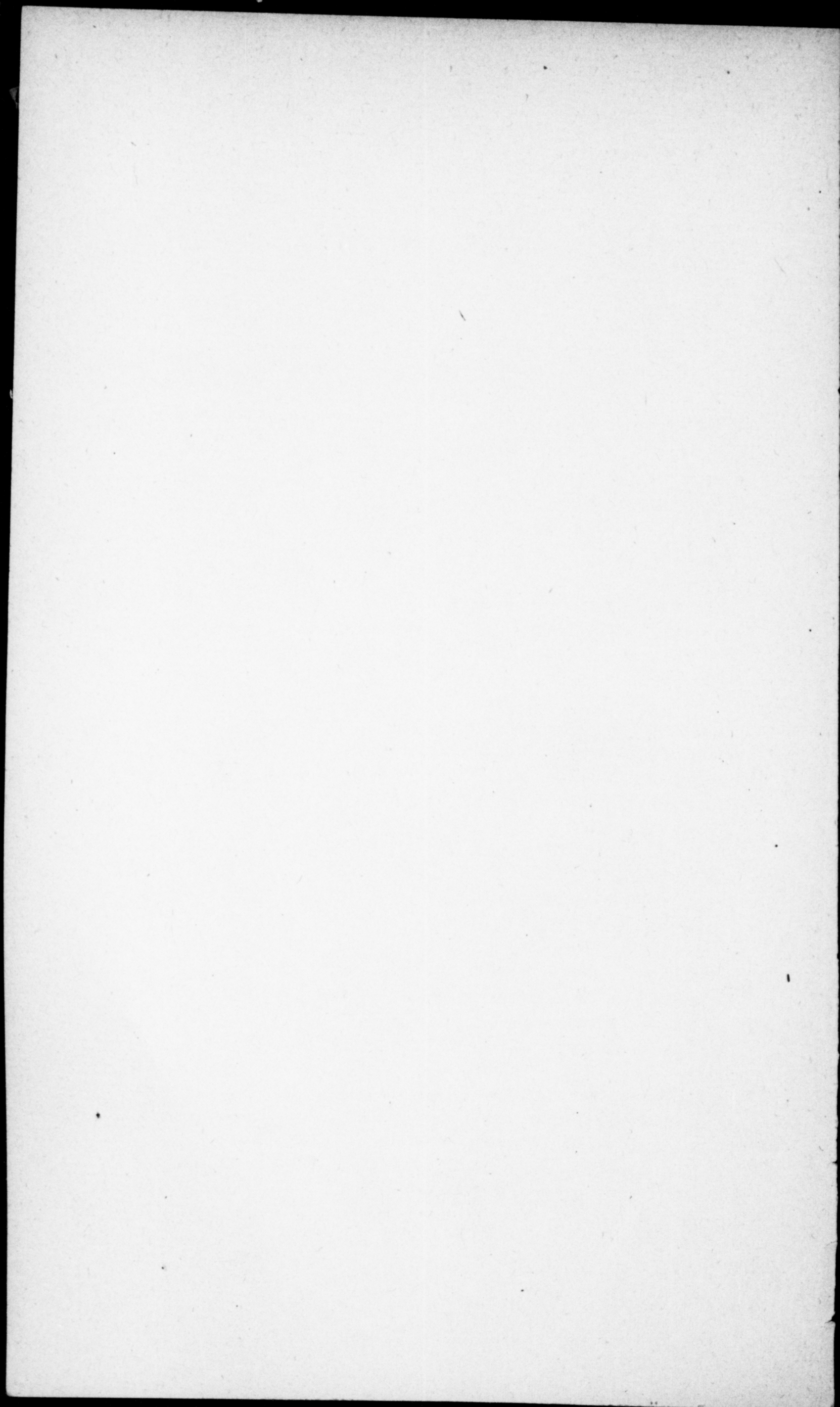
In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 28th day of February, 1916.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

36

[Endorsed:] No. 2926. Edward O. Scaggs et al., appellants, vs. James B. Gallagher. Return to Writ of Certiorari. Court of Appeals, District of Columbia. Filed Mar. 1, 1916. Henry W. Hodges, clerk.



COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

MAY 15 1916

Henry W. Hodgson
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In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1916.

No. 2926.

EDWARD O. SCAGGS AND MARIAN E. SCAGGS,
APPELLANTS,

vs.

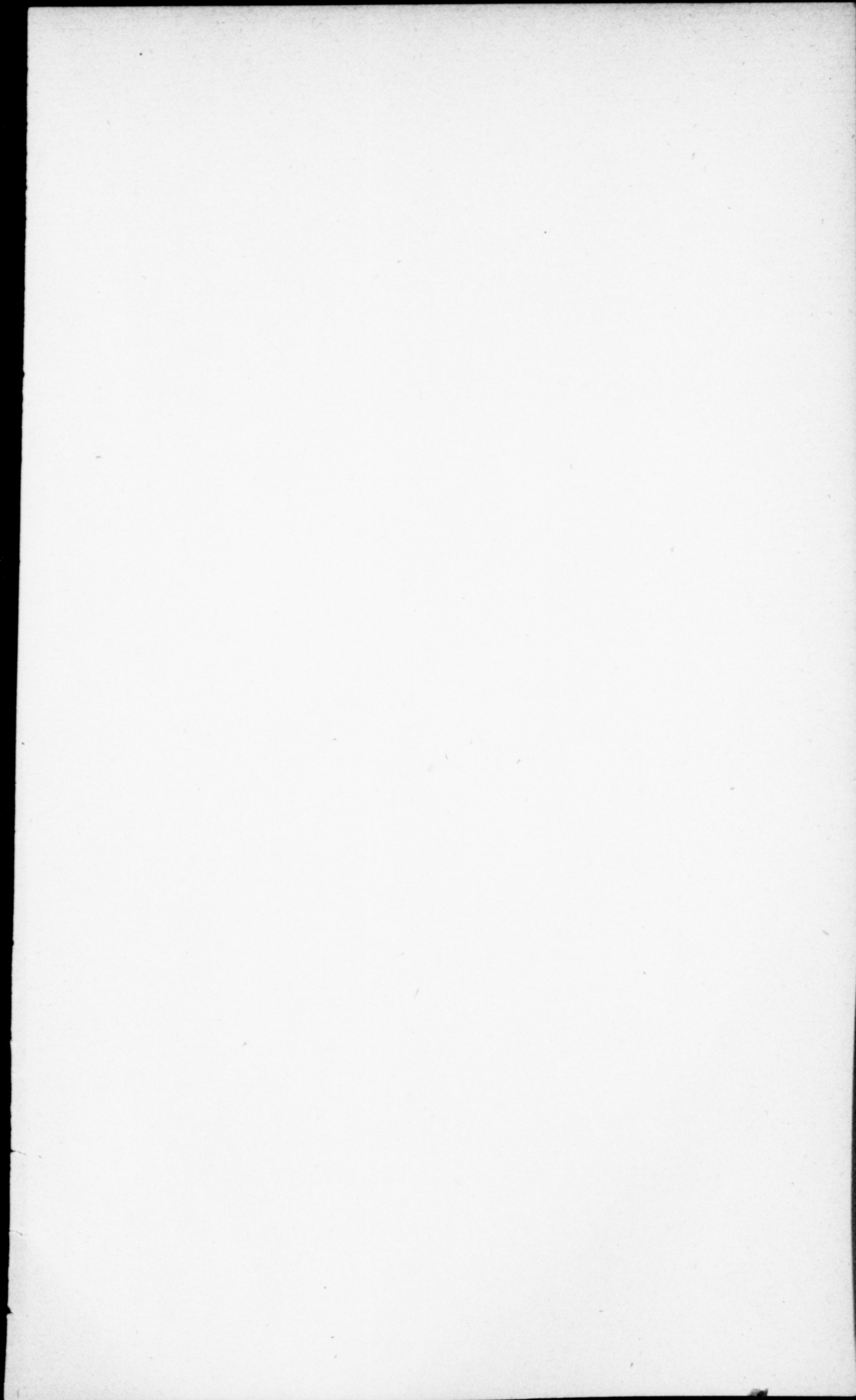
JAMES B. GALLAGHER.

APPEAL FROM THE SUPREME COURT OF THE
DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

GEO. W. DREW,

Attorney for Appellants.



In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1916.

No. 2926.

**EDWARD O. SCAGGS AND MARIAN E. SCAGGS,
APPELLANTS,**

vs.

JAMES B. GALLAGHER, APPELLEE.

**APPEAL FROM THE SUPREME COURT OF THE DIS-
TRICT OF COLUMBIA.**

Statement of Facts.

This is an appeal from a decree of the Supreme Court of the District of Columbia, in equity, cause James B. Gallagher *vs.* Edward O. Scaggs and Marian E. Scaggs, by said court, in favor of the plaintiff, below, the appellee herein, on a bill in equity, as fully set forth in the transcript of record, herein, answer of defendants, below, the appellants herein, is fully set forth in the transcript of record herein, by reference to the same, it will appear that the allegations of facts, alleged in the bill, were fully denied.

Prior to July, 1883, title to a certain piece of land in the District of Columbia, known as block seven (7) in Todd and Brown's subdivision of the tracts of land known as "Pleasant Plains" and "Mount Pleasant" in the County of Washington, District of Columbia, was vested in Algernon H. McChesney and Henry Baker-smith, as trustees, for the Enterprise Building Associa-

tion, an unincorporated association, with power in said trustees, to sell and to convey. For the purpose of sale, said block seven (7) was divided into sundry parcels, and one of the lots in said block seven (7) to wit, lot one (1), was divided into four parts or lots, and three (3) of these lots were conveyed to three (3) different parties by said trustees, and one of these lots, now described and known as lot 802, in square 2891, and always taxed in the name of said trustees, as a lot, up to the 19th day of August, 1914, when said Algernon H. McChesney, surviving trustee of the Enterprise Building Association, conveyed said lot to Edward C. Scaggs, and Marian E. Scaggs, his wife, and said lot is described and distinguished as follows:

Part of lot one (1) in block seven (7) in Todd and Brown's subdivision of the tracts of land known as "Mount Pleasant" and "Pleasant Plains," as per plat recorded in Liber Levy Court, No. 2, folio 24, of the records of the office of the surveyor of the District of Columbia, described as follows: Beginning for the same on the north line of Irving Street at a point distant forty-one and five-tenths (41.5) feet east of the southwest corner of said lot, and running thence east ten (10) feet; thence north fifty (50) feet to the north line of said lot; thence west on the north line of said lot, ten (10) feet; thence south fifty (50) feet to the point of beginning.

The said lot described is the lot involved in this case. The appellants, herein, contend that it was one of the four (4) lots into which lot one (1) was divided, always, as a fact, was designated as a lot, on the assessment books of the District of Columbia, and always remained as a lot in the name of said trustee, and as said lot, said surviving trustee, being the owner, having a legal right to convey it, he did convey the same to said Edward O. Scaggs and Marian L. Scaggs, by the aforesaid deed. The appellee claims it was an alley, but the facts in the case,

although the abutting lots might have used it as such, they only went over it as a lot, and had no legal right to claim it or use it as an alley, as it was not an easement.

The second prayer of the bill, of the appellant, below, the appellee, herein, prays, namely, that the said deed from said McChesney as surviving trustee, to said Scaggs and his wife, be decreed null and void, and be set aside, but this prayer was not granted by the court below, in that the court below sustained the legal right of said Scaggs to said lot in fee simple, but did decree said lot subject to a perpetual easement, as an alley, to the adjoining lots. For this reason the appellants noted an appeal to this court.

Assignment of Errors.

1. The court below erred in the sustaining of the prayers of the bill, and in the granting of the relief therein prayed for.
2. The court erred in holding that lot in question was an alley, with right of use, in the plaintiff.
3. The court erred in holding that the deed to the defendants, vested in the defendants, fee simple title to said lot, subject to easement in the plaintiff.

ARGUMENT.

Said strip of land, the issue involved in this case, being part of lot one (1) in block seven (7) in Todd and Brown's subdivision of part of the tracts of land known as "Mount Pleasant" and "Pleasant Plains," as per plat recorded in Liber Levy Court, No. 2, folio 24, of the records of the office of the surveyor of the District of Columbia, described as follows: Beginning for the same on the north line of Irving Street at a point dis-

tant forty-one and five-tenths (41.5) feet east of the southwest corner of said lot, and running thence east ten (10) feet; thence north fifty (50) feet to the north line of said lot; thence west on said north line of said lot ten (10) feet; thence south fifty (50) feet to the point of beginning.

Said strip of land, or lot, claimed as an alley by the appellee, was never recorded in any plat within the District of Columbia, as an alley, but always remained in the name of the trustees, as a strip of land or lot, and no description of said strip of land, designating said lot as an alley, was ever conveyed to said trustees, but always remained on record in their name, as a strip of land or lot, up to the time, said surviving trustee, conveyed the fee simple title of said strip of land to Edward C. Scaggs and Marian L. Scaggs, August 19, 1914, the said lot being in fee simple title in said trustee, the said surviving trustee had a lawful right to convey said strip of land in fee simple to said appellants herein, and in the deed of the surviving trustee to the appellants, there is nothing said in reference to the same being an alley, but is described as a lot only, without any easement or use of the same as an alley, for any of the adjoining lots and therefore the said appellants owned said strip of land in fee simple absolutely, and without any right or easement over the same by the adjoining lot owners, and the said appellants, owning said lot in fee simple without any easement being mentioned in said conveyance by said trustees, had lawful right to build on it, or dispose of it in any manner the said appellants wished.

Said strip of land, involved in this litigation was never offered to District Government until the year 1909, as per letter by surviving trustees in 1909, and by letters from the District Building, to said surviving trustee; the District Government declined to accept it,

and it was assessed in the trustee's name, as spoken of in said letter, and the fee simple title to said strip of land continued in the name of said surviving trustee, and said strip of land being in fee simple in said surviving trustee, was conveyed by said surviving trustee on August 19, 1914, to said appellants herein, and said deed conveyed the fee simple title absolutely and no easement was mentioned in said deed, giving any of the adjoining landholders the right to pass over the said lot.

The deed conveying said strip of land or lot involved in this litigation was made and prepared by the Columbia Title Co., at the suggestion of the said surviving trustee, and he signed and swore to it, and there was nothing mentioned in the deed about any easements to any adjoining property holder, but the deed so prepared, signed and sworn to, by the said surviving trustee, was an absolutely fee simple deed, to the said appellants, to the said lot, and consideration in said deed was the sum of \$5 and said deed was recorded August 21, 1914, in Liber 3727, folio 255, of the records of the office of the recorder of deeds of the District of Columbia.

It is submitted that the decree of the Supreme Court of the District of Columbia be reversed, and said bill be ordered dismissed.

GEO. W. DREW,
Attorney for Appellants.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

JUN 13 1916

Henry W. Hodges
Deputy Clerk

Court of Appeals, District of Columbia.

APRIL TERM, 1916.

No. 2926.

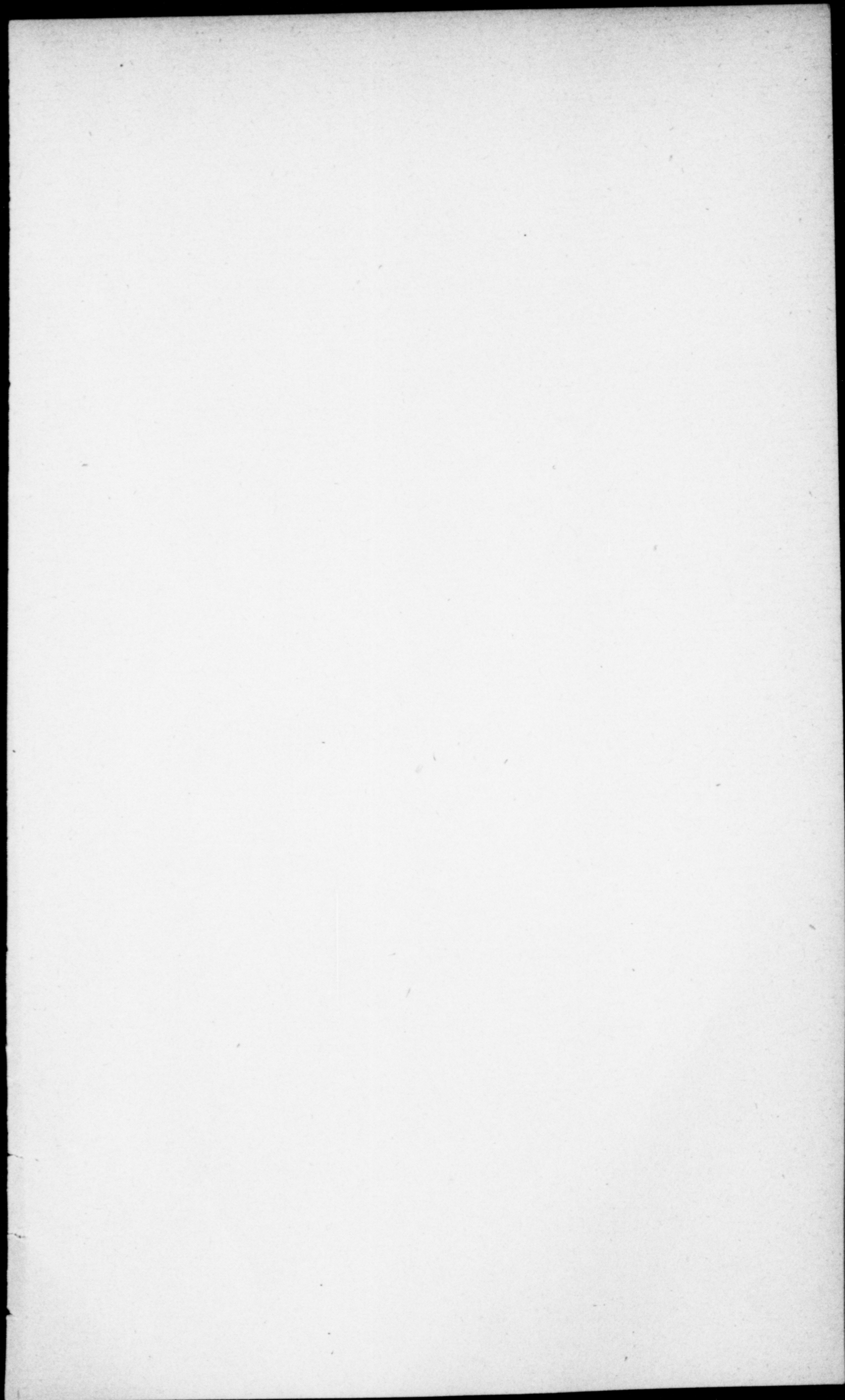
EDWARD O. SCAGGS ET AL., APPELLANTS,

vs.

JAMES B. GALLAGHER, APPELLEE.

BRIEF FOR APPELLEE.

OSCAR NAUCK,
JOHN RIDOUT,
Attorneys for Appellee.



Court of Appeals, District of Columbia.

APRIL TERM, 1916.

No. 2926.

EDWARD O. SCAGGS ET AL., APPELLANTS,

vs.

JAMES B. GALLAGHER, APPELLEE.

BRIEF FOR APPELLEE.

Statement of the Case.

On and prior to July 1, 1883, the title to block seven (7), in Todd & Brown's subdivision, as described in the bill, was vested in Algernon R. McChesney and Henry Bakersmith as trustees for the Enterprise Building Company, an unincorporated association, with power in said trustees to sell and convey at their discretion.

The block fronts on Georgia avenue, formerly Seventh Street road, extending westerly to Sherman avenue, being bounded on its southern boundary by Wallach street, now

Irving street. A diagram showing the situation is made a part of the bill and appears on page 12 of the record.

For the purpose of sale the said block was divided into sundry parcels, lot one (1) of said block being divided into three parcels, which are marked on said plat respectively "Gallagher," "Westermeyer," and "Scaggs."

The first two parcels fronted on Georgia avenue, and immediately at the rear of these parcels an alleyway ten (10) feet wide and extending from the north line of Irving street northerly to the north line of said lot one (1) was reserved for the benefit of the parcels into which lot one (1) was subdivided.

On the west of said ten-foot alleyway was another part of said lot one (1) fronting forty (40) feet on Irving street by a depth of fifty (50) feet, and said alleyway was well defined, so that the fact of its existence as an easement appurtenant to said parcels of lot one (1) was apparent to any person dealing with said portions of lot one.

The first parcel conveyed was that marked on said plat as "Gallagher," which was conveyed in 1883 to John W. Payne, who shortly thereafter, and in September of the same year, conveyed said "Gallagher" lot to the appellee. A description of said parcel is incorporated in the bill, and appears on page 2 of the record.

It will be observed that in that description the alley is recognized and called for.

Upon the acquisition of title the appellee built a dwelling-house on the front part of his lot, and in the rear thereof erected a shed having a door or gate opening out into said alleyway.

In 1886, appellant Edward O. Scaggs acquired title to the parcel marked "Scaggs" on said plat. At this time the existence and use of the alley by appellee was apparent.

After the conveyance to said Scaggs he erected a dwelling on his part of said lot, and in so building availed himself of the said alleyway and adjusted his dwelling and fences thereto, and used the said alley.

Thereafter, and until shortly before the filing of the bill, said Scaggs used said alleyway as such, and fully recognized its existence as a private alleyway set apart for the benefit of the said three parts of said lot one (1) in block seven (7), and neither said Scaggs nor his wife, Marion E. Scaggs, ever claimed or asserted any right or interest in said ten-foot strip other than as owners in common with the plaintiff and the other owner of the remaining part of said lot one of the alley easement hereinbefore described.

Bakersmith, one of the trustees, removed from the District of Columbia some years ago. McChesney, the other trustee, made sundry attempts to procure the acceptance by the District of Columbia of a formal dedication of said alleyway, which were prevented by the existence of unpaid taxes thereon.

Upon the representation by the defendant Marion E. Scaggs that the appellee had procured a tax deed for said strip and was about to prevent the use of the same as an alley, which representation was not true, said McChesney was induced, without any consideration and for the purpose, as stated by said appellants, of protecting and perpetuating said alleyway, to convey said ten-foot strip to said appellants by a deed absolute on its face.

So far as is known, Bakersmith is still living, and McChesney was therefore without authority, as matter of law, to make any conveyance as surviving trustee.

After obtaining the deed last mentioned appellants commenced the erection of certain structures in said alleyway, whereupon appellee at once notified them that the said strip was an alleyway, and that they were without any title or authority in anywise to obstruct it; but the appellants disregarded this notice, and proceeded with said erection, whereupon the appellee filed the bill in this case.

The appellants answered, asserting absolute title in said strip and denying the existence of said easement.

Proof was taken in open court, which is embodied in the digest of testimony (Record, 11 to 17).

On the 11th of October, 1915, the final decree appealed from was passed. The case is here on appeal from that decree.

The assignments of error really only amount to assigning as error the decree appealed from.

There is no testimony in the case contradicting that of the plaintiff appellee, and the record thereof presents a case wherein an alleyway was by the owners of the whole tract definitely and visibly set apart, was recognized by a description in deeds prior in the chain of title to that under which the appellants claim, and of which they were bound to take notice.

The proof shows, without contradiction, that the appellants not only had this constructive notice, but had actual notice by the location of appellant's house and the other improvements in the lot, and that the appellants accepted and recognized the situation and conformed their own improvements and use of the alley thereto.

There is thus presented the legal situation which was accurately dealt with in the cases hereinafter cited, and upon the authority of these cases, as well as upon settled equitable principles, it is submitted that at least a quasi-easement for alley purposes was created, and that the conveyance to the appellants passed the title to their original property, subject to that easement over said strip and with the right thereto as appurtenant to their original purchase.

In the light of these circumstances, and of the record and of the physical situation, it is apparent that the title to said ten-foot strip was at the time of the conveyance to the appellants by McChesney, as surviving trustee, vested either in him and Bakersmith, or, if the latter were dead, in said McChesney, in trust to hold said strip for the benefit of the three parcels into which lot one had been divided, for the purpose of a common alleyway for all three of said parcels.

Nothing is better settled than that a conveyance by a trustee in derogation of his trust passes the legal title to the grantees subject to the trust.

This legal principle was properly recognized and enforced by the decree below.

If authority for the appellee's contentions is needed it is to be found in the cases of

Wood *vs.* Grayson, 22 App. D. C., 432.

Frizzell *vs.* Murphy, 19 App. D. C., 440.

Wilson *vs.* Riggs, 27 D. C. App., 550.

Preston *vs.* Seibert, 21 App. D. C., 405.

Sanford *vs.* Porter, 34 Washington Law Reporter, 259.

Robinson *vs.* Hillman, 36 App. D. C., 241.

Richardson *vs.* Mushake, 36 Washington Law Reporter, 748.

The rule established by these cases may well be stated thus:

That everything apparent and continuous that is essential to the beneficial use and enjoyment of the property designated in the grant is, in the absence of language indicating a different intention, to be considered as passing by the grant.

Upon the record and these authorities, and the settled principles which are applicable, the appellee respectfully submits that the decree below was right and should be affirmed.

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